

International Association of Heat and Frost Insulators and Asbestos Workers, Local No. 66 and Alton W. Crisp and API, Inc. and Sheet Metal Workers International Union, Local Union No. 29. Case 17-CD-295

9 August 1983

DECISION AND DETERMINATION OF DISPUTE

BY CHAIRMAN DOTSON AND MEMBERS
ZIMMERMAN AND HUNTER

This is a proceeding under Section 10(k) of the National Labor Relations Act, as amended, following a charge filed by Alton W. Crisp (Crisp) alleging that International Association of Heat and Frost Insulators and Asbestos Workers, Local No. 66 (Asbestos Workers), violated Section 8(b)(4)(D) of the Act by engaging in certain proscribed activity with an object of forcing or requiring API, Inc. (the Employer), to assign certain work to employees represented by Asbestos Workers rather than to employees represented by Sheet Metal Workers International Union, Local Union No. 29 (Sheet Metal Workers).

Pursuant to notice, a hearing was held before Hearing Officer Daniel L. Hubbel on 6 April 1983 at Denver, Colorado. All parties appeared at the hearing and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to adduce evidence bearing on the issues. Thereafter, the Employer and Sheet Metal Workers filed briefs.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has reviewed the rulings made by the Hearing Officer at the hearing and finds that they are free from prejudicial error. They are hereby affirmed.

Upon the entire record in this proceeding, the Board makes the following findings:

I. THE BUSINESS OF THE EMPLOYER

The parties stipulated, and we find, that the Employer is a Minnesota corporation engaged in the manufacture and installation of insulation and metal lagging. At all times material herein, it has been engaged as a subcontractor at the Sunflower Electric Cooperative Project at Holcomb, Kansas. During the 12 months preceding the hearing, the Employer purchased and received goods and materials valued in excess of \$50,000 directly from suppliers outside the State of Kansas. Accordingly, we find the Employer is engaged in commerce within the meaning

of Section 2(6) and (7) of the Act and that it will effectuate the purposes of the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATIONS INVOLVED

The parties stipulated, and we find, that Asbestos Workers and Sheet Metal Workers are labor organizations within the meaning of Section 2(5) of the Act.

III. THE DISPUTE

A. Background and Facts of the Dispute

The Employer is an insulation subcontractor on the Sunflower Electric Cooperative Project, a power plant construction project at Holcomb, Kansas. When the Employer's general foreman, Rick Shaw, arrived at the job, he contacted the Asbestos Workers business agent, Donald Schaffer, about insulation and metal lagging work. Schaffer told Shaw that, in addition to insulation work, Asbestos Workers did 95 percent of the metal lagging in Schaffer's jurisdiction. Although Shaw had no authority to do so, he told Schaffer to send people represented by Asbestos Workers to the jobsite. At the jobsite Shaw assigned employees represented by Asbestos Workers to insulation work and subsequently to the work of installing metal lagging greater than .016 inches in thickness.

When the Sheet Metal Workers business agent, Ron Weems, learned that employees represented by Asbestos Workers were doing the work in dispute, he called the Employer's regional manager, Robert Nelson, and claimed the lagging work. Nelson halted work at the jobsite and called a meeting of the two Unions in the Employer's office. At the meeting, both Unions presented evidence to support their respective claims to the lagging work. Subsequently, the Employer sent letters to both Unions advising them that it was assigning the lagging work to employees represented by Sheet Metal Workers.

Asbestos Workers responded to the Employer's assignment by submitting the matter to the Impartial Jurisdictional Dispute Board (IJDB) for the construction industry in October or November 1982. However, that board had been inactive since 1 June 1981 and remained so as of the date of the hearing. Thereafter, on 8 November 1981, Asbestos Workers attorney, Buddy Wright, wrote a letter to the Employer in which he stated, *inter alia*, "based upon the jurisdictional dispute, we will advise the local and other individual members and non-members of this wrongful assignment and to seek to take any and all action in opposition of said assignment." Additionally, on 23 November, Schaffer

sent a letter to the jurisdictional director of the International Association of Heat and Frost Insulators and Asbestos Workers, with a copy to the Employer, stating, *inter alia*, "we continue to advance our position and will by 1 December, place an informational picket at the jobsite." As of the time of the hearing, Asbestos Workers had not engaged in picketing at the jobsite.

B. *The Work In Dispute*

The work in dispute, as amended at the hearing, is the installation of metal lagging greater than .016 inches in thickness other than that work being performed by the composite crew.

C. *Contentions of the Parties*

The Employer and Sheet Metal Workers contend there is reasonable cause to believe that Asbestos Workers violated Section 8(b)(4)(D) and that there is no agreed-upon method for the adjustment of the dispute. Both contend that the work in dispute should be awarded to employees represented by Sheet Metal Workers on the basis of the collective-bargaining agreement between the Employer and Sheet Metal Workers, Employer practice, industry and area practice, relative skills, Employer preference, and interunion agreements.

Asbestos Workers contends that the work in dispute should be awarded to employees represented by it based on the factors of area practice and relative skills.

D. *Applicability of the Statute*

Before the Board may proceed with a determination of dispute pursuant to Section 10(k) of the Act, it must be satisfied that there is reasonable cause to believe that Section 8(b)(4)(D) has been violated and that the parties have not agreed upon a method for voluntary adjustment of the dispute.

As noted above, when the Employer assigned the work in dispute to employees represented by Sheet Metal Workers, Asbestos Workers threatened "to seek to take any and all action in opposition of said assignment" and subsequently to "place an informational picket at the jobsite." Additionally, the parties stipulated that the 8 November letter by the Asbestos Workers attorney was written on behalf of the Local and was intended to be a threat. The parties further stipulated that, based both on that letter and the 23 November letter of the Asbestos Workers business agent, Asbestos Workers engaged in threats proscribed by Section 8(b)(4)(D) of the Act with an object of forcing or requiring the Employer to assign the work in dispute to employees represented by it.

Based on the foregoing, and on the record as a whole, we find reasonable cause exists to believe that an object of the threats by Asbestos Workers was to force the Employer to assign the work in dispute to employees represented by Asbestos Workers and that a violation of Section 8(b)(4)(D) has occurred.

As noted above, Asbestos Workers submitted the dispute over the work in question to the IJDB. Under the terms of the Sunflower Electric Cooperative, Inc., project agreement, all of the parties are bound to abide by the rules and decisions of the IJDB. However, the IJDB ceased issuing decisions on 1 June 1981 and the record shows that it had not recommenced issuing decisions as of the date of the hearing. Since the IJDB is not in a position to render an award,¹ and since there is no evidence of any other agreed-upon method, we find that there is no agreed-upon method for the voluntary adjustment of the dispute. Accordingly, we find the dispute is properly before the Board for determination under Section 10(k) of the Act.

E. *Merits of the Dispute*

Section 10(k) of the Act requires the Board to make an affirmative award of disputed work after giving due consideration to various factors.² The Board has held that its determination in a jurisdictional dispute is an act of judgment based on commonsense and experience reached by balancing those factors involved in a particular case.³

1. Certification and collective-bargaining agreements

Neither of the Unions involved herein has been certified by the Board as the collective-bargaining representative for a unit of the Employer's employees. At all times material herein, Sheet Metal Workers has had a collective-bargaining agreement with the Employer containing jurisdictional language which is sufficient to encompass the work in dispute.⁴ The Employer has no collective-bargaining agreement with Asbestos Workers. Accordingly, we find that the factor of collective-bargaining agreements favors an award of the disputed work to employees represented by Sheet Metal Workers.

¹ See, generally, *Laborers Local 449 (Modern Acoustics, Inc.)*, 260 NLRB 883 (1982).

² *NLRB v. Electrical Workers IBEW Local 1212 (Columbia Broadcasting)*, 364 U.S. 573 (1961).

³ *Machinists Lodge 1743 (J. A. Jones Construction)*, 135 NLRB 1402 (1962).

⁴ Thus the collective-bargaining agreement provides "this agreement covers . . . employees of the Employer . . . engaged in . . . lagging over insulation."

2. Employer practice and preference

It is undisputed that the Employer's practice over at least the past 10 years has been to assign metal lagging work over .016 inches in thickness to employees represented by Sheet Metal Workers, and that, with the exception of one Iowa project, the Employer consistently has followed this practice. Although Shaw, the Employer's general foreman, initially assigned the disputed work to employees represented by Asbestos Workers, the record discloses that he had no authority to do so. The record further discloses that the Employer prefers to continue to follow its practice of assigning the disputed work to employees represented by Sheet Metal Workers, since their performance has been satisfactory. We therefore find that the factor of Employer practice favors an award of the work in dispute to employees represented by Sheet Metal Workers. We further find that, although not entitled to controlling weight, the factor of Employer preference favors an award of the disputed work to employees represented by Sheet Metal Workers.

3. Industry and area practice

Sheet Metal Workers presented evidence that employees represented by it had been assigned metal lagging work in many areas of the country. Both Sheet Metal Workers and Asbestos Workers produced evidence to show that they had been assigned metal lagging work in the southwest Kansas area. Neither industry practice nor area practice is sufficiently clear to be helpful in determining this dispute.

4. Relative skills

The record reveals that both groups of employees possess the requisite skills to perform the work in dispute. We therefore find that the factor of relative skills is not helpful to our determination.

5. Interunion agreement

In 1957, Sheet Metal Workers International Association and International Association of Heat and Frost Insulators and Asbestos Workers, the parent organizations of the respective Unions involved herein, entered into an agreement. That agreement, by its terms, assigned the application of aluminum lagging heavier than .016 inches to Sheet Metal Workers. However, it is undisputed that in 1968 International Association of Heat and Frost Insulators and Asbestos Workers abrogated the agreement. The Board has not assigned significant weight to such agreements where all the parties

have not agreed to abide by them.⁵ Accordingly, we give no significant weight to the interunion agreement.

Conclusion

Upon the record as a whole, and after full consideration of all the relevant factors involved, we conclude that the employees who are represented by Sheet Metal Workers are entitled to perform the work in dispute. We reach this conclusion based on the collective-bargaining agreement between the Sheet Metal Workers and the Employer, Employer practice, Employer preference, and the fact that the employees represented by Sheet Metal Workers possess the requisite skills to perform the disputed work. In making this determination, we are awarding the work in dispute to the employees represented by the Sheet Metal Workers, but not to that Union or its members. The present determination is limited to the particular controversy which gave rise to this proceeding.

DETERMINATION OF DISPUTE

Pursuant to Section 10(k) of the National Labor Relations Act, as amended, and upon the basis of the foregoing findings and the entire record in this proceeding, the National Labor Relations Board makes the following Determination of Dispute:

1. Employees of API, Inc., who are represented by Sheet Metal Workers International Union, Local Union No. 29, are entitled to perform the installation of metal lagging greater than .016 inches in thickness other than that work being performed by the composite crew.

2. International Association of Heat and Frost Insulators and Asbestos Workers, Local No. 66, is not entitled by means proscribed by Section 8(b)(4)(D) of the Act to force or require API, Inc., to assign the disputed work to employees represented by that labor organization.

3. Within 10 days from the date of this Decision and Determination of Dispute, International Association of Heat and Frost Insulators and Asbestos Workers, Local No. 66, shall notify the Regional Director for Region 17, in writing, whether or not it will refrain from forcing or requiring API, Inc., by means proscribed by Section 8(b)(4)(D) of the Act, to assign the disputed work in a manner inconsistent with the above determination.

⁵ See *Iron Workers Local 361 (Concrete Casting Corp.)*, 209 NLRB 112 (1974).